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**Raila Amolo Odinga and Another v Independent Electoral and
Boundaries Commission and Others Presidential Petition No. 1 of 2017**
O'Brien Kaaba

The Facts

On the 8 August 2017, the Republic of Kenya held its second general election under the 2010 Constitution. On the 11 August 2017, the Independent Electoral and Boundaries Commission (IEBC) declared the incumbent, Uhuru Kenyatta, as the outright winner. Kenyatta garnered 8,203,290 votes, beating his closest rival, Raila Odinga, who secured 6,762,224 votes. Dissatisfied with the results, Odinga and his running mate, Stephen Kalonzo Musyoka, filed a petition challenging the election of Kenyatta in the Supreme Court of Kenya.

The main issues for determination were as follows:

- a) Whether the 2017 presidential election was conducted in accordance with the principles laid down in the Constitution and the law relating to the elections;
- b) Whether there were irregularities and illegalities in the conduct of the 2017 presidential election;
- c) If there were irregularities and illegalities, what impact, if any, these had on the integrity of the election; and
- d) What consequential orders, declarations and relief the Court should grant, if any.

The Holding

By a majority of four to two judges, the Court held that:

- a) The presidential election held on 8 August 2017 was not conducted in accordance with the Constitution and applicable law, rendering the declared result invalid, null and void;
- b) The irregularities and illegalities in the presidential election were substantial and significant, and affected the integrity of the election;
- c) Uhuru Kenyatta was not validly declared as president elect and that the declaration was invalid, null and void; and
- d) The IEBC should organize and conduct fresh presidential elections in strict conformity with the Constitution and applicable electoral laws within 60 days.

Significance

The Supreme Court's judgment is significant for at least four reasons. First, it reflects the first time that an African court has nullified a presidential election. Despite the numerous defective presidential elections that have been challenged in courts, African courts have until this decision evolved a jurisprudence that has upheld all presidential elections, regardless of the severity of anomalies proved. Judges in presidential election petitions have tended to see themselves not as handmaids of the rule of law but simply there to confirm the announced results. Perhaps this jurisprudence was best stated in the Ghanaian presidential election judgment of 2013 when the Supreme Court stated:

For starters, I would state that the judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in public interest, to sustain it.¹

The Kenyan Supreme Court deviates from this jurisprudence and correctly restates the role of the Court, which is fidelity to the Constitution and the law, or as the Court rhetorically asked, "For what is the need of having a Constitution, if it is not respected?" The Kenyan decision concretely incarnates the often recited but rarely respected constitutional line: The Constitution is the supreme law of any country.

The second important point about the judgment, and perhaps its greatest contribution to electoral jurisprudence in Africa, is its correct application of the "substantial effect" rule. Often election results are affected by honest mistakes, incompetence of election officials, corruption, fraud, violence, intimidation, and other irregularities. Some of these irregularities may be minor and inconsequential. However, many others are significant and bear on the fairness and legitimacy of an election.

When courts are faced with an election petition, there is therefore a need for a legal device or mechanism to determine which irregularities are minor and inconsequential, and which are significant and in need of redress. The substantial effect rule does that. For many Anglophone African countries, this is an old rule inherited from the English legal system. The main point of

¹ See the majority judgment of *Atuguba JSC in Nana Addo Dankwa-Addo and others vs. John Dramani Mahama and others No.J2/6/2013 Judgement of 29 August 2013*, 40

the rule is that elections should not be nullified for minor irregularities or infractions of rules.²

The rule is enacted in the English statute, the Representation of People Act, which has a history going back to the 1800s,³ stating that:

No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary election rules if it appears to the tribunal having cognizance of the question that:-

- (a) The election was so conducted as to be substantially in accordance with the law as to the elections; and
- (b) The act or omission did not affect its results.⁴

The idea behind the rule is that trivial mistakes, omissions and commissions should not lead to the annulment of an election, provided that the overall fairness of the election was not vitiated. Lord Denning identified three strands to this rule:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the results of the election.
3. If the election was conducted substantially in accordance with the law as to elections, but there was nevertheless a breach of the rules or a mistake at the polls that did affect the results, then the election is vitiated.⁵

In Africa, the substantial effect rule has worked in the most disingenuous way to uphold elections fraught with major irregularities and fraud. Two

² See *John Fitch vs. Tom Stephenson and others Case No.M324/107[2008]EWHC 501(QB) [38]*

³ See Eggers and Spirling “The Judicialisation of Electoral Dispute Resolution: Partisan Bias and Bipartisan Reform in 19th Century Britain”, 2-8

⁴ Representation of the People Act 1983, Section 23(3). See also Section 48 of the same Act.

⁵ *Morgan vs. Simpson [1975] 1QB 151*

examples can be given to illustrate the point. The first relates to the Ugandan case of *Kizza Besigye vs. Yoweri Kaguta Museveni*.⁶ This petition was brought by the main opposition losing candidate, Dr. Kizza Besigye, challenging the election of the incumbent, President Museveni, following the February 2006 election. The Presidential Elections Act states:

The election of a candidate as a president shall only be annulled on any of the following grounds, if proved to the satisfaction of the court:

- (a) ...that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a substantial manner.⁷

At the hearing of the petition, the issues for decision by the Supreme Court of Uganda were:

1. Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act, in the conduct of the 2006 presidential election;
2. Whether the election was not conducted in accordance with principles laid down in the Constitution, Presidential Elections Act and Electoral Commission Act;
3. Whether, if either of the first or second issues were answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner; and
4. Whether the alleged illegal practices or any electoral offences in the petition were committed by the president personally, or by his agents with his knowledge and consent or approval.⁸

With respect to the first two issues (whether there was non-compliance or failure to conduct the election in accordance with the law), the Supreme Court judges were unanimous that the election was vitiated by the disenfranchisement of voters. A number of illegalities were cited: the unlawful deletion of names

⁶ *Presidential Election Petition No.01 of 2006*

⁷ Presidential Election Act, Section 59(6)(a)

⁸ See the majority judgment of Odoki CJ in *Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006*

from the voters' register; wrongful counting and tallying of results; bribery; intimidation; violence; multiple voting; and ballot stuffing.⁹

On the third issue, however (whether the election results were affected), by a majority of four to three, the Court held that the failure to comply with the provisions and principles in the statutes did not affect the election in a substantial manner.¹⁰ On the fourth issue, by a majority of five to two, the Court held that, although there were illegal practices and other offences, these were not committed by the President or his agents nor were they committed with his knowledge or approval.¹¹

The third issue (substantial effect), however, was the main issue around which the petition revolved and was mainly resolved. The majority dismissed the petition, holding that in determining if the irregularities and malpractices affected the results in a substantial manner, numbers were the sole measuring yardstick. Since in terms of votes garnered, the gap between the winner and the runner up could not be bridged even if the anomalies were taken into account, the court could not tamper with the results.

The second example is the *Zambian* case of *Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others*.¹² The case was brought following the 2001 *Zambian* general elections. The Supreme Court admitted that there were many flaws in the electoral process, including the use of the national intelligence in a partisan way, the unlawful use of public resources by the incumbent party and abuse of resources from parastatal companies.¹³ These anomalies notwithstanding, the Supreme Court held that it could not grant any remedy or interfere with the result of the election because, taking into account the national character of the presidential election, "where the whole country formed a single electoral college," it could not be said that the proven "defects were such that the majority of the voters were prevented from electing the candidate whom they preferred."¹⁴ In the view of the court, the petitioners were supposed to prove that the flaws "seriously affected the result" to such an extent that it could no longer be viewed as the true

⁹ Ibid, 5.

¹⁰ Ibid, 5.

¹¹ Ibid, 5.

¹² (2005) ZR, 18.

¹³ *Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others* in (2005) ZR, Ibid138.

¹⁴ Ibid, 119.

reflection of the majority of the voters.¹⁵ To demonstrate this, the petitioners should have proved “electoral malpractices and violations of the electoral laws in at least a majority of the constituencies.”¹⁶

In contrast to the Mazoka decision, the Kenyan decision demonstrates that it is not only what happens on polling day that matters, but the entire process. Elections, as the Court correctly observed, “are not events but processes”. It was the process of the 2017 Kenyan election — and in particular the use of the country’s new electoral management system — that led the Court to invalidate the result.

Prior to the 2017 Kenyan election, the Elections Act was amended to introduce the Kenya Integrated Electoral Management System (KIEMS). This system was intended to be used in the biometric voter registration and, on polling day, for voter identification. The system was also to be used to transmit election results from polling stations simultaneously to the Constituency Tallying Centre and the National Tallying Centre. The transmission of results required the use of standard forms (Forms 34A and 34B).

In practice, however, the transmission of results was not done as required by the law. No plausible explanation was given by the IEBC for this. The petitioners alleged that the system was hacked and results tampered with in favour of the incumbent. The Court appointed its own IT experts to assess the IEBC servers and report their findings to the Court. IEBC, in violation of the Court order, declined to give the Court appointed IT experts access to critical areas of the server.

The Court held that the failures by IEBC were a clear violation of the Constitution and the Elections Act, and caused serious doubt as to whether the election results could be said to be a free expression of the will of the people as required by the Constitution. The Court declined to take what has been the easy way out by many African courts, as urged by the defendants. That easy way out was to state that even if all the anomalies were taken into account, in terms of numbers, the gap between the declared winner and the runner up was too big to be bridged. It held that elections are not just about numbers, but that in order to gauge whether the result reflects the will of the people, the quality of the entire process must be taken into account. In the words of the Court:

¹⁵ Ibid, 18.

¹⁶ Ibid

“Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computation path one has to take, as proof that the process indeed gives rise to the stated solution.”

The third important point about the Kenyan court’s judgment in *Odinga* relates to consequences for disobeying a court order in the process of adjudicating a disputed presidential election. Courts in Africa have generally dealt with officials or incumbent candidates who disobey court orders in a timid way. In the Nigerian case of *Muhammadu Buhari and others vs. Olusegun Obasanjo and others*,¹⁷ for example, the losing candidate, Muhammadu Buhari, sought and was granted an injunction by the court restraining the then President and his running mate from presenting themselves for swearing-in into office, pending the determination of the main election petition.¹⁸ The respondents, in violation of the court order, proceeded with a purported swearing-in, and the applicants appealed to the Supreme Court to determine the validity of the swearing-in when it was done in violation of a valid court order. The Supreme Court held that the application was no longer of any relevance since the respondents were already sworn-in and, therefore, any injunction granted by the Court would simply be an academic exercise, with no *res* or status quo to protect.¹⁹ Amazingly, the acts taken by the President in violation of the court order were the same acts that insulated him from any consequences and secured his position in power.

By contrast, the Kenyan decision in *Odinga* demonstrates that disobeying a court order should have adverse consequences. The Kenyan Supreme Court in the course of the petition had appointed independent IT experts and ordered IEBC to give them access to the servers in order to independently determine whether the system had been hacked. IEBC, however, “contumaciously disobeyed the order,” leading the Court to draw an adverse inference against IEBC, and to accept the petitioners’ claim that “either IEBC’s IT system was infiltrated and compromised and the data therein interfered with or IEBC’s officials themselves interfered with the data....” The fourth and final point of significance of the *Odinga* decision relates to the Court’s statement regarding election observation. It often happens that observers trivialize some anomalies or, without observing the entire electoral process, certify an election as credible. This often gives a veneer of legitimacy to frequently

¹⁷ 133/2003 17 NWLR (2003)

¹⁸ Ibid, 3.

¹⁹ Ibid, 5.

spurious election results. For example, the European Union (EU) Observation Mission to Zambia's 2016 elections acknowledged that it was unable to observe the transmission and tallying of national results and further observed that:

The aggregation of results was conducted according to procedure in only 61 per cent of cases observed. In some instances, presiding officers did not stay throughout the processing of the material for their polling station, and returning officers did not always announce results, nor regularly print copies of the record of proceedings of the vote tabulation. The announcement of results form was not posted outside the totalling centre in 22 per cent of cases.²⁰

Yet, the EU went ahead and certified the election results as reflecting the will of the people. The Kenyan Supreme Court rightly frowned upon this kind of election observation. In the case of Kenya, all the major international election observers certified the election as credible, or largely reflecting the will of the people. These conclusions were entirely based on what was observable on polling day, without taking into account the transmission of results. The Court had this to say:

In passing only, we must also state that whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before us points to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports cannot therefore be used to authenticate the transmission and eventual declaration of results.

Ultimately, the judgment is not only ground breaking but also a breath of fresh air for African electoral jurisprudence. The decision demonstrates an unalloyed and unwavering commitment to constitutionalism and the rule of law. It is only through such principled adjudication that African courts can promote a course of development anchored on respect for human rights, accountability and the rule of law. As the court stated, the greatness of any nation lies not in the might of its armies but in "fidelity to the Constitution and strict adherence to the rule of law."

²⁰ European Union Election Observation Mission, Final Report Republic of Zambia General Elections and Referendum 11 August 2016 (2016), 6 and 33.